

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 18, 2015**

Diane M. Fremgen  
Clerk of Court of Appeals

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP2696-CR  
STATE OF WISCONSIN**

Cir. Ct. No. 2010CF542

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JACOB M. McCANN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Winnebago County: JOHN A. JORGENSEN, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Jacob McCann appeals from a judgment convicting him of repeated sexual assault of the same child and from an order denying his postconviction motion for a new trial. On appeal, McCann urges this court to grant him a new trial due to ineffective assistance of trial counsel or because the

real controversy was not fully tried. We are unpersuaded and affirm the circuit court.

¶2 McCann's ineffective assistance claim arises out of his trial counsel's failure to present trial testimony from the victim's nine-year-old sister. The sisters shared a bedroom during the time when McCann allegedly sexually assaulted the victim. The sister gave a videotaped interview during the investigation. The six-year-old victim and her sister slept in bunk beds; the victim slept on the bottom and her sister slept on the top. The victim testified at trial that McCann repeatedly sexually assaulted her in the lower bunk while her sister was in the upper bunk. McCann had been in a romantic relationship with the girls' mother.

¶3 Trial counsel testified at McCann's postconviction hearing. Trial counsel's theory of defense was that the accusations were fabricated and arose from disputes and tensions between McCann and the victim's mother. Trial counsel testified that she reviewed the videotaped interviews of the victim and her sister. In her interview, the sister was unable to corroborate the victim's sexual assault claims because the sister was sleeping. For that reason, the sister could not deny that the assaults occurred. Counsel viewed the sister's interview statement as not corroborating the State's theory of the case that McCann sexually assaulted the victim in the bottom bunk while the sister was in the top bunk.

¶4 Counsel's investigator was unable to interview the sister pretrial, and counsel recalled that the mother declined to let counsel speak with the sister in the hallway at trial. Although counsel subpoenaed the sister for trial, counsel elected not to present the sister's testimony because counsel did not know the likely content of the sister's testimony. While counsel characterized the sister's likely

testimony as neutral, counsel also considered the risk that the sister could offer testimony for which counsel was unprepared and which could have been damaging to McCann's defense. Counsel was also concerned that given the conflict between the mother and McCann and the fact that the sister lived with the mother, the sister's testimony might have been influenced by her mother to McCann's detriment.

¶5 Counsel made use of the sister's absence from trial. Counsel used the sister's absence to argue that the jurors should have reasonable doubt because the sister should have been in a position to corroborate the victim's assault claims. Counsel believed that the jury would wonder why the sister did not testify and if the jury was perplexed, that would inure to McCann's benefit. Counsel believed that the mother's testimony that she did not hear anything in her daughters' room, despite having a baby monitor in their room and her own room, favored McCann.

¶6 The mother and sister testified at the postconviction motion hearing. The sister testified that she and the victim shared bunk beds, she never saw or heard McCann come into the bedroom, she was not aware that McCann was sexually assaulting the victim in the bottom bunk, she would not wake up if her sister went to the bathroom in the middle of the night, and if someone got into the victim's lower bunk, it would not have moved the bed. The girls' mother testified that if trial counsel had asked to interview the sister, the mother would have allowed her to do so.

¶7 The circuit court found that trial counsel made a strategic decision not to present the sister's testimony. The court found credible trial counsel's testimony that she considered calling the sister to testify at trial, but because she was not allowed to speak with the sister before trial, she had significant concerns

about what the sister might say to the jury. The court noted that planning to impeach the sister with her prior interview presented its own risks because one could not predict which version of the sister's contradictory statements the jury would find credible. In both her opening statement and closing argument, trial counsel noted the sister's absence from the trial. The circuit court concluded that trial counsel did not perform deficiently in relation to the sister's testimony. The court further concluded that McCann was not prejudiced by counsel's strategic decision.

¶8 On appeal, McCann renews his argument that his trial counsel was ineffective in relation to the sister's testimony. To establish ineffective assistance of counsel, "a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance." *State v. Kimbrough*, 2001 WI App 138, ¶26, 246 Wis. 2d 648, 630 N.W.2d 752 (citations omitted). We will uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.*, ¶27. The circuit court, as the finder of fact at the postconviction motion hearing, was charged with assessing the credibility of the witnesses at that hearing. *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. Whether trial counsel's performance was deficient and prejudicial presents a question of law that we review independently. *Kimbrough*, 246 Wis. 2d 648, ¶27.

¶9 The test for deficient performance "is whether counsel's assistance was reasonable under the facts of the particular case, viewed as of the time of counsel's conduct," keeping "in mind that counsel's function is to make the adversarial testing process work in the particular case." *State v. Marcum*, 166 Wis. 2d 908, 917, 480 N.W.2d 545 (Ct. App. 1992). Counsel's performance is not deficient where he or she has made "strategic or tactical decisions ... based upon

rationality founded on the facts and the law.” *State v. Felton*, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983).

¶10 We agree with the circuit court that trial counsel made a strategic decision, and we agree with its conclusion that counsel did not perform deficiently in relation to the sister’s testimony. The court’s findings regarding counsel’s representation have support in the record. The court’s conclusion that counsel did not perform deficiently is bound up with its credibility determination. When a circuit court’s conclusion is rooted in its assessment of a witness’s credibility, we accept that determination. *State v. Quarzenski*, 2007 WI App 212, ¶19, 305 Wis. 2d 525, 739 N.W.2d 844. Trial counsel had to weigh the risks and benefits of the sister’s unknown, unpredictable testimony, and counsel used the absence of the sister’s testimony and other evidence to buttress McCann’s argument that the allegations were fabricated.

¶11 The circuit court declined to order a new trial because the real controversy, whether the assaults occurred, was tried. We agree. To show an entitlement to a new trial, a defendant must demonstrate “that the jury was precluded from considering ‘important testimony that bore on an important issue....’” *State v. Cleveland*, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543 (citation omitted).

¶12 McCann characterizes as crucial the sister’s testimony that she did not hear anything amiss in the lower bunk. For the reasons discussed in relation to McCann’s ineffective assistance claim, we conclude that the sister’s testimony was not crucial. The evidence before the jury that favored McCann’s defense included that the sister was in the bedroom when the assaults occurred, the sister

could not deny that the assaults occurred, and no sounds of an assault came over the baby monitor in the mother's bedroom.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

